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10
11 **UNITED STATES DISTRICT COURT**
12 **NORTHERN DISTRICT OF CALIFORNIA**
13 **SAN JOSE DIVISION**
14

15 IN RE: HIGH-TECH EMPLOYEE
ANTITRUST LITIGATION

Master Docket No. 11-CV-2509-LHK

16
17 THIS DOCUMENT RELATES TO:

**DEFENDANTS' JOINT RESPONSE TO
PLAINTIFFS' MOTION FOR
APPLICATION OF THE PER SE
STANDARD**

18 ALL ACTIONS

ORAL ARGUMENT REQUESTED

19
20 Judge: Hon. Lucy H. Koh
Date: May 8, 2014
21 Time: 1:30 p.m.
22 Crtrm: 8
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1 **I. INTRODUCTION**

2 The rule of reason, not the per se rule, is the presumptive standard under Section 1 of the
 3 Sherman Act. The per se rule applies to only a few specific types of restraints that substantial
 4 judicial experience has shown have obvious anticompetitive effects and lack any redeeming virtue.
 5 Over the last twenty years, the Supreme Court has repeatedly narrowed the per se rule's scope and
 6 rejected attempts, including by the U.S. Department of Justice and Federal Trade Commission, to
 7 extend its application to additional types of restraints or to untested or unusual fact situations.

8 The conspiracy alleged here is unlike any conspiracy to which courts have applied the per
 9 se rule or "quick look" analysis. Plaintiffs allege that Defendants conspired to limit information
 10 available to employees through cold calls and that this had the ultimate effect of suppressing the
 11 wages of all Defendants' technical employees. But Plaintiffs do not allege that Defendants agreed
 12 to restrict jobs or hiring or actually to fix their employees' compensation. In other words, the
 13 alleged conspiracy, unlike every category of restraint that is subject to the per se rule or "quick
 14 look" analysis, involved neither output reduction nor price fixing. According to Plaintiffs, the
 15 seven Defendants conspired to enter into a "network" of six two-party do-not-cold-call ("DNCC")
 16 agreements. The DNCC agreements existed only where the two parties had collaborative business
 17 relationships and left unrestricted all other means of recruiting and hiring each other's employees.
 18 Cold calling, recruiting, and hiring between the other fifteen pairs of Defendants and between
 19 them and the remaining 98% of the technical-employee market were entirely unaffected.

20 Courts have no experience with either DNCC agreements or this type of alleged
 21 conspiracy, much less experience that makes clear they have obvious anticompetitive effects.
 22 Courts have, however, rejected the per se and quick look rules and applied the rule of reason to:
 23 more restrictive restraints on employee recruiting and hiring; agreements that limited information
 24 but did not fix prices or restrict output; an agreement of comparably limited scope but including a
 25 far larger share of the relevant market; and restraints ancillary to collaborative relationships. While
 26 Plaintiffs allege that the purpose of the purported conspiracy was to suppress compensation, the
 27 same (or the equivalent, to raise prices) can be said of most cases in which courts have rejected the
 28 per se and quick look tests. Moreover, the antitrust economists who have analyzed the DNCC

1 agreements conclude that they likely have procompetitive benefits and would not have
 2 anticompetitive effects. For these reasons, Plaintiffs cannot satisfy their burden of justifying a
 3 departure from the presumptive rule-of-reason standard.¹

4 **II. ARGUMENT**

5 **A. The Rule of Reason Is the Presumptive Standard, and Plaintiffs Have the** 6 **Burden of Justifying a Departure from that Standard**

7 “The rule of reason is the presumptive or default standard, and it requires the antitrust
 8 plaintiff to ‘demonstrate that a particular contract or combination is in fact unreasonable and
 9 anticompetitive.’” *California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1133 (9th Cir. 2011)
 10 (en banc) (quoting *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006))²; see also *State Oil Co. v. Khan*,
 11 522 U.S. 3, 10 (1997) (“most antitrust claims are analyzed under a ‘rule of reason’”). A departure
 12 from the rule of reason is “appropriate only after courts have had considerable experience with the
 13 type of restraint at issue” and “can predict with confidence that it would be invalidated in all or
 14 almost all instances under the rule of reason.” *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*,
 15 551 U.S. 877, 886-87 (2007) (citations omitted). Thus, “courts ordinarily do not apply the per se
 16 rule to a practice the first time they encounter it. That judgment can be made only after
 17 ‘considerable judicial experience’ showing that anticompetitive effects dominate any alternative
 18 explanation.” Herbert Hovenkamp, *THE ANTITRUST ENTERPRISE* 118 (2005) (quoting *Broadcast*
 19 *Music, Inc. v. Colum. Broadcasting Sys.*, 441 U.S. 1, 2 (1979)).

20 “To justify a *per se* prohibition, a restraint must have ‘manifestly anticompetitive’ effects
 21 and lack ‘any redeeming virtue.’” *Leegin*, 551 U.S. at 886 (citations omitted). Thus, “[r]esort to
 22 *per se* rules is confined to restraints ... ‘that would always or almost always tend to restrict
 23 competition and decrease output.’” *Id.* (quoting *Bus. Elecs Corp. v. Sharp Elecs Corp.*, 485 U.S.
 24 717, 723 (1988)); see also *Hahn v. Oregon Physicians’ Serv.*, 868 F.2d 1022, 1026 (9th Cir. 1989)
 25 (same) (citing *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 100 (1984)); *Pipe Fitters*

26 ¹ Even were the Court to conclude that the per se rule would apply to the alleged conspiracy,
 27 Plaintiffs would still bear the burden of proving that each Defendant entered into that conspiracy,
 28 that each member of the class suffered antitrust injury, and the amount of any damages.

² All emphases and alterations are added unless otherwise indicated.

1 *Local Union No. 120 Pension Fund v. Barclays Capital Inc.*, 2011 WL 3844196, at *4 (N.D. Cal.
 2 Aug. 30, 2011) (same); *O'Bannon v. NCAA*, 2010 WL 445190, at *4 (N.D. Cal. Feb. 8, 2010)
 3 (same).³ Horizontal price fixing, market divisions, and certain group boycotts and tying
 4 arrangements are the only restraints to which a per se prohibition applies. *Hahn*, 868 F.2d at 1026
 5 (9th Cir. 1989). Group boycotts and tying arrangements, however, are deemed per se unlawful
 6 only where the defendants possess market power because they (unlike price fixing and market
 7 division) do not directly fix prices or restrict output. *See F.T.C. v. Indiana Fed'n of Dentists*, 476
 8 U.S. 447, 458 (1986) (group boycotts); *Illinois Tool Works v. Indep. Ink, Inc.*, 547 U.S. 28, 34
 9 (2006) (tying arrangements); *General Leaseways*, 744 F.2d at 594 (“[An agreement to limit
 10 output] is the equivalent of a division of markets.”).

11 Tellingly, all of the per se cases cited in section I of Plaintiffs’ brief involved price fixing
 12 or market division. *See Arizona v. Maricopa Cty. Med. Soc’y*, 457 U.S. 332, 335-36 (1982)
 13 (horizontal agreement that fixed physicians’ fees); *United States v. Brown*, 936 F.2d 1042, 1045
 14 (9th Cir. 1991) (agreement allocated geographic markets between competing billboard
 15 companies); *United States v. Cooperative Theatres of Ohio*, 845 F.2d 1367, 1368, 1370 (6th Cir.
 16 1988) (agreement between competing theatre booking agents to allocate customers); *Blackburn v.*
 17 *Sweeney*, 53 F.3d 825, 826-27 (7th Cir. 1995) (agreement between competing lawyers to allocate
 18 geographic markets); *Fleischman v. Albany Med. Ctr.*, 728 F. Supp. 2d 130, 156-62 (N.D.N.Y.
 19 2010) (evidence of horizontal price-fixing conspiracy sufficient to survive summary judgment);
 20 *Doe v. Arizona Hosp. & Healthcare Assoc.*, 2009 WL 1423378, at *3 (D. Ariz. Mar. 19, 2009)

21 _____
 22 ³ Courts often equate output restrictions with price fixing and use the former to encompass the
 23 latter because “reduced output is the almost inevitable result of higher prices [and vice-versa].”
 24 *Fortner Enters., Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 503 (1969). *See also Cal. Dental Ass’n v.*
 25 *FTC*, 526 U.S. 756, 777 (1999) (“An agreement on output also equates to a price-fixing
 26 agreement. If firms raise price, the market’s demand for their product will fall, so the amount
 27 supplied will fall too—in other words, output will be restricted. If instead the firms restrict output
 28 directly, price will as mentioned rise in order to limit demand for to the reduced supply.” (quoting
General Leaseways, Inc. v. Nat’l Truck Leasing Ass’n, 744 F.2d 588, 594-95 (7th Cir. 1984)
 (Posner, J.)). Here, to lower compensation, Defendants would have needed to reduce the number
 of jobs (*i.e.*, output). *See* Am. Expert Report of Edward A. Snyder, Ph.D., ¶ 20 (Dec. 6, 2013)
 (“Snyder Rpt.”), attached to Plfs.’ Mot., Cisneros Decl., Dkt. 833, Ex. 7 (“Cisneros Decl.”). There
 is no evidence this occurred here.

(horizontal agreement to “jointly set ... wages and compensation [and adopt] uniform pay rate scale”). None of these restraints is similar to the conspiracy alleged here, which allegedly limited only one means of recruiting while placing no restrictions on either hiring or compensation.

The Supreme Court has “‘expressed reluctance to adopt *per se* rules where the economic impact of certain practices is not immediately obvious.’” *Safeway*, 651 F.3d at 1133 (quoting *Dagher*, 547 U.S. at 5). Indeed, in the last two decades, the Court has repeatedly *narrowed* the categories of restraints that are subject to the *per se* rule and *rejected* efforts to extend that rule to new restraints. *See, e.g., F.T.C. v. Actavis, Inc.*, 133 S. Ct. 2223, 2237 (2013) (holding rule of reason applies to “reverse-payment” patent settlements); *Leegin*, 551 U.S. at 887-907 (overruling *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911) and holding all vertical price restraints are judged under the rule of reason); *Dagher*, 547 U.S. at 8 (rejecting *per se* rule for price-setting agreement between joint-venture participants); *Illinois Tool Works*, 547 U.S. at 34 (applying rule of reason proof requirement to tying claim). Plaintiffs do not even mention *Actavis*, *Leegin*, *Dagher*, or *Illinois Tool Works*—the most recent Supreme Court decisions on application of the *per se* and rule of reason standards.⁴

As this Court indicated (CMC Hr’g Tr. at 21:23-22:8, Mar. 27, 2014) (Ex. 1),⁵ Plaintiffs have the burden of persuading the Court that it should depart from the presumptive rule-of-reason standard here. *See Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 298 (1985) (“A plaintiff seeking application of the *per se* rule must present a threshold case that the challenged activity falls into a category likely to have predominantly anticompetitive effects.”). Plaintiffs must demonstrate that the courts have sufficient experience with the conspiracy and restraint alleged here “to predict with confidence that the rule of reason will condemn it.” *Safeway*, 651 F.3d at 1133. That prediction must be “based upon demonstrable economic effect,” not “formalistic line drawing,” and plaintiffs must establish that the type of

⁴ Plaintiffs cite *In re Cardizem CD Antitrust Litig.*, 332 F.3d 896 (6th Cir. 2003) (Mot. at 15), but, notably, the Sixth Circuit’s holding there that the *per se* rule applies to reverse-payment patent settlements was overruled in *Actavis*. 133 S. Ct. at 2237.

⁵ The evidence cited herein, unless otherwise indicated, is attached to the accompanying Declaration of Gregory M. Sergi and cited as “Ex. ___”.

1 restraint at issue “would always or almost always tend to ... decrease output,” that its
 2 “immediately obvious” economic effect would be “manifestly anticompetitive,” and that it lacks
 3 “any redeeming virtue.” *Id.*

4 To the extent Plaintiffs seek application of a “truncated rule of reason” or “quick look”
 5 analysis, *see id.* at 1134, their burden is similarly heavy. Such analysis “is appropriate only where
 6 ‘an observer with even a rudimentary understanding of economics could conclude that the
 7 arrangements in question would have an anticompetitive effect on customers and markets.’”
 8 *Actavis*, 133 S. Ct. at 2237 (quoting *Cal. Dental*, 526 U.S. at 770). “[I]f an arrangement ‘might
 9 plausibly be thought to have a net procompetitive effect, or possibly no effect at all on
 10 competition,’ then a ‘quick look’ form of analysis is inappropriate.” *Safeway*, 651 F.3d at 1134
 11 (quoting *Cal. Dental*, 526 U.S. at 771).

12 **B. The Alleged Overarching Conspiracy Is Unusual and Extremely Limited in**
 13 **Scope and Did Not Restrict Hiring or Fix Compensation**

14 Plaintiffs allege that the seven Defendants entered into a single “overarching conspiracy”
 15 to create “a network of unlawful bilateral [DNCC] agreements.” Plfs.’ MSJ Opp., Dkt. 603, at 18
 16 (Feb. 6, 2014); *see also* Order Granting Plfs.’ Supp’l Mot. for Class Cert., Dkt. 531, at 4 (Oct. 24,
 17 2013) (“The [alleged] conspiracy consisted of an interconnected web of express bilateral
 18 agreements among Defendants to abstain from actively soliciting each other’s employees.”)

19 The alleged conspiracy is highly unusual and extremely limited in at least six crucial
 20 respects. *First*, it placed no restrictions whatsoever on hiring or jobs, either at the Defendant
 21 companies or in any relevant market. As Plaintiffs’ counsel explained, “this is not a case about
 22 suppression of hiring,” but only a case about “suppression of information flow.” Ex. 1, CMC Hr’g
 23 Tr. at 46:14-17. *Second*, the alleged conspiracy involved no agreement about employees’
 24 compensation. *Third*, it comprised only six two-party agreements between six pairs of Defendants,
 25 leaving the other fifteen Defendant-pairs unaffected—for example, the conspiracy did not restrict
 26 Adobe’s cold calling Google, Intel, Intuit, Lucasfilm, or Pixar employees, and vice-versa. *Fourth*,
 27 the alleged conspiracy affected only one of many recruiting methods. For example, Apple was free
 28 to recruit Adobe employees by every means other than cold calling—online and print job postings,

1 job fairs, word-of-mouth, interviewing applicants, employee referrals, and others—and to hire
 2 unlimited numbers of Adobe employees. *Fifth*, the alleged conspiracy affected cold calling
 3 between only Defendant-pairs that had some type of collaborative or advisory relationship. *Sixth*,
 4 the alleged conspiracy left totally unaffected cold calling, other forms of recruiting, and hiring
 5 between the seven Defendants and the entire rest of the labor market for technical employees. That
 6 market includes such giants as Microsoft, Oracle, Amazon, Electronic Arts, Cisco, HP, IBM, Dell,
 7 IBM, Samsung, Yahoo, AMD, and scores of other technology companies, as well as universities
 8 and governmental entities. Plaintiffs offer no evidence to dispute that the seven Defendants
 9 accounted for roughly 2 percent of the “technical” employees in the United States. *See Snyder*
 10 *Rpt.* ¶ 38 & Ex. 2a (“Defendants represented approximately 2 percent of all high technology
 11 jobs”).

12 **C. Neither Judicial Experience Nor Economic Analysis Warrants Departure**
 13 **from the Presumptive Rule-of-Reason Standard**

14 **1. There is no judicial experience with the type of conspiracy alleged here**

15 No judicial experience justifies treating the alleged conspiracy as per se illegal. Defendants
 16 are not aware of, and Plaintiffs have not cited, any judicial decision that addresses (a) the legality
 17 under the antitrust laws of an agreement between two or more companies not to cold call each
 18 other’s employees; or (b) an alleged conspiracy in which multiple competitors, who make up a
 19 tiny percentage of the market, do not agree to restrict price or output but instead agree only to
 20 restrict one means of competition between a few pairs of defendants, while leaving that same
 21 competitive tool unrestricted between most defendant pairs and the vast majority of the market.
 22 Simply put, there is *no judicial experience* with a conspiracy remotely similar to the one alleged
 23 here. For that reason alone, per se or “quick look” treatment is inappropriate. *See In re Sulfuric*
 24 *Acid Antitrust Litig.*, 703 F.3d 1004, 1011-12 (7th Cir. 2012) (Posner, J.) (“It is relevant that we
 25 have never seen or heard of an antitrust case quite like this. . . . The per se rule is designed for
 26 cases in which experience has convinced the judiciary that a particular type of business practice
 27 has no (or trivial) redeeming benefits ever.”); *Northrop Corp. v. McDonnell Douglas Corp.*, 705
 28 F.2d 1030, 1052 (9th Cir. 1983) (“We find no significant judicial rule-of-reason experience with

1 either the particular practice or industry at issue here and therefore conclude that imposing a new
2 *per se* rule would be premature.”).

3 The DOJ’s allegation that the individual DNCC agreements were *per se* violations is
4 entitled to no weight.⁶ *See, e.g., Marion Healthcare LLC v. S. Illinois Healthcare*, 2013 WL
5 4510168, at *10 n.3 (S.D. Ill. Aug. 26, 2013) (holding that DOJ Complaint, Competitive Impact
6 Statement, and Final Judgment “are not authoritative or controlling.”). Federal courts have
7 consistently interpreted sections 5(a) and (h) of the Clayton Act, 15 U.S.C. §§ 16(a) & (h), as
8 prohibiting any reliance on a consent decree or competitive impact statement in private antitrust
9 litigation. *See, e.g., Lipsky v. Commonwealth United Corp.*, 551 F.2d 887, 893 (2d Cir. 1976);
10 *United States v. Microsoft Corp.*, 215 F. Supp. 2d 1, 9 n.7 (D.D.C. 2002); *Metrix Warehouse, Inc.*
11 *v. Daimler-Benz Aktiengesellschaft*, 555 F. Supp. 824, 826 (D. Md. 1983).⁷

12 Moreover, the Supreme Court and many other courts have repeatedly *rejected* arguments
13 by the DOJ and FTC that certain practices should be judged under the *per se* or “quick look” rule.
14 *See, e.g., Actavis*, 133 S. Ct. at 2237-38 (rejecting the FTC’s arguments that “quick look” analysis
15 should apply to reverse-payment settlements); *Cal. Dental*, 526 U.S. at 762-63 (rejecting FTC’s
16 argument for *per se* or “quick look” analysis of advertising restrictions); *White Motor Co. v.*
17 *United States*, 372 U.S. 253 (1963) (rejecting DOJ’s argument that the *per se* rule applied to
18 vertical territorial limitations); *United States v. Microsoft Corp.*, 253 F.3d 34, 94 (D.C. Cir. 2001)
19 (rejecting DOJ’s argument that *per se* rule should be applied to tying arrangement); *United States*
20 *v. Brown Univ.*, 5 F.3d 658, 672, 678 (3d Cir. 1993) (rejecting DOJ’s argument for *per se* rule and
21 district court’s application of an “abbreviated rule of reason” analysis); *United States v.*
22 *Studiengesellschaft Kohle, m.b.H.*, 670 F.2d 1122, 1130 (D.C. Cir. 1981) (rejecting DOJ’s
23 argument for *per se* rule regarding restrictions on sale of products by patent licensees); *United*

24
25 _____
26 ⁶ The DOJ did not allege the existence of any overarching conspiracy among the Defendants.

27 ⁷ Plaintiffs’ citation to Dr. Snyder’s testimony about the *per se* rule, *see* Mot. at 1, is misleading.
28 Dr. Snyder never testified that he *agreed* with the DOJ’s allegation that the DNCC agreements
were *per se* illegal. To the contrary, as noted elsewhere, he testified that the agreements both could
have no meaningful anticompetitive effect and could be procompetitive.

1 *States v. Reality Multi-List, Inc.*, 629 F.2d 1351, 1362 (5th Cir. 1980) (rejecting DOJ’s argument
 2 for per se rule against restrictions on membership in real estate listing group).

3 **2. Courts apply the rule of reason to more restrictive restraints on**
 4 **employee recruiting and hiring**

5 Courts have consistently refused to apply the per se rule to both two-party and multilateral
 6 restraints on employee recruiting that were significantly more restrictive than the DNCC
 7 agreements at issue here. In *Union Circulation Company, Inc. v. F.T.C.*, 241 F.2d 652 (2nd Cir.
 8 1957), the Second Circuit applied the rule of reason to an agreement among several magazine
 9 subscription sales agencies not to hire each other’s agents and, in some instances, not to hire
 10 agents of *any* other company. *Id.* at 655-57. This multilateral agreement was a flat ban on hiring,
 11 not merely a restriction on one recruiting method, and there were no related business
 12 collaborations among the defendants. *Id.* In rejecting per se treatment, the Second Circuit
 13 emphasized that “a harmful effect upon competition is not clearly apparent from the terms of these
 14 agreements.” *Id.* at 657. The court reaffirmed this decision forty years later in refusing to apply the
 15 per se rule to a multilateral “no-switching” agreement that prevented hiring of insurance agents.
 16 *Bogan v. Hodgkins*, 166 F.3d 509, 515 (2nd Cir. 1999) (“the Agreement’s anticompetitive effect
 17 on the market for insurance sales agents is not obvious”).

18 Many other courts have refused to apply the per se rule and instead applied the rule of
 19 reason to no-hiring and no-recruiting agreements. *See, e.g., Eichorn v. AT&T Corp.*, 248 F.3d 131,
 20 138-44 (3rd Cir. 2001) (“we can find no support within the relevant case law for [the per se]
 21 label”); *Consultants & Designers, Inc. v. Butler Serv. Grp.*, 720 F.2d 1553, 1555-56, 1562-64
 22 (11th Cir. 1983) (upholding no-hiring agreements under rule of reason); *Nichols v. Spencer Int’l*
 23 *Press, Inc.*, 371 F.2d 332, 335-37 (7th Cir. 1967) (applying rule of reason to no-hiring agreement);
 24 *Weisfeld v. Sun Chem. Corp.*, 210 F.R.D. 136, 141-43 (D.N.J. 2002) (applying rule of reason to
 25 “[c]ontracts among employers to not hire the employees of other parties to the agreement”);
 26 *UARCO Inc. v. Lam*, 18 F. Supp. 2d 1116, 1124 (D. Haw. 1998) (applying rule of reason to “no-
 27 hire agreements among competitors”). While Plaintiffs *assert* that “[a]n agreement between two
 28 labor competitors not to solicit *any* of each other’s employees violates the Sherman Act per se,”

1 Mot. at 4:1-2 (emphasis in original), they cite *no authority* for that proposition, while ignoring the
 2 cases, cited here, that analyze restrictions on employee recruiting under the rule or reason.

3 **3. Courts reject per se and “quick look” analysis of restraints, such as**
 4 **restrictions on information, that do not directly and obviously restrict**
 5 **output**

6 As explained above, *supra* pp. 2-5, for a category of restraint to qualify for per se
 7 treatment, the restraint must “facially appear[] to be one that would always or almost always tend
 8 to restrict competition *and decrease output*.” *BMI*, 441 U.S. at 19-20; *see also Leegin*, 551 U.S. at
 9 886-87. Similarly, “quick look” analysis applies only to “naked restraints on price and output.”
 10 *Cal. Dental*, 526 U.S. at 769. For that reason, the Supreme Court has made clear that where, as
 11 here, an alleged agreement restricts *information*, not *output*, application of either the per se or
 12 “quick look” rule is inappropriate. In *Cal. Dental*, the Supreme Court addressed an agreement
 13 among dentists, through their trade association, not to engage in certain forms of price and quality
 14 advertising. *Id.* at 760-64. The Ninth Circuit, in support of its “quick look” analysis, had
 15 concluded that “restrictions on the ability to advertise prices normally make it more difficult for
 16 consumers to find a lower price and for dentists to compete on the basis of price,” *id.* at 773, and
 17 that “[t]hese restrictions are in effect a form of output limitation, as they restrict the supply of
 18 information about individual dentists’ services,” *id.* at 776. Here, similarly, Plaintiffs’ theory is
 19 that the DNCC agreements, by suppressing information, made it more difficult for employees to
 20 learn about opportunities for higher pay. *See Order Granting Plfs.’ Supp’l Mot. for Class Cert.*,
 21 Dkt. 531, at 38 (“Plaintiffs allege that the elimination of cold calling deprived all employees of
 22 information regarding pay packages”); *Order re Defs.’ Mots. Regarding Dr. Leamer*, Dkt. 788,
 23 at 8 (Apr. 4, 2014) (“Dr. Leamer hypothesized that ... Defendants’ anti-solicitation agreements
 24 impaired information flow about compensation and job offers.”).

25 The Supreme Court rejected the Ninth Circuit’s application of “quick look” analysis,
 26 explaining that “the relevant output for antitrust purposes . . . is presumably not information or
 27 advertising, but dental services themselves.” *Id.* Thus, “[t]he question is not whether the universe
 28 of possible advertisements has been limited (as assuredly it has), but whether the limitation on
 advertisements obviously tends to limit the total delivery of dental services.” *Id.* Concluding that it

1 was not obvious that the ban on certain forms of advertising—a restriction on the information
 2 available to consumers—would harm competition and suppress output, the Court held that “[t]he
 3 obvious anticompetitive effect that triggers abbreviated analysis has not been shown.” *Id.* at 776-
 4 79. *See also MLB Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 317-18 (2d Cir. 2008) (explaining
 5 *Cal. Dental*).

6 Like the conspiracy in *Cal. Dental*, the alleged conspiracy here had no obvious effect on
 7 output (*i.e.*, hiring or jobs). Under *Cal. Dental*, the relevant question is not whether the universe of
 8 information available to employees has been limited, but whether any such limitation on
 9 information “obviously” tends to limit the number of jobs or the amount of hiring. Here, Plaintiffs
 10 do not even claim—far less attempt to prove—that the alleged conspiracy suppressed hiring or
 11 jobs. Indeed, Plaintiffs’ counsel expressly *disclaimed* any suppression of hiring: “this is not a case
 12 about suppression of hiring,” but only about “suppression of information flow.” Ex. 1, CMC Hr’g
 13 Tr. at 46:14-17. Plaintiffs’ expert, Dr. Leamer, concedes he has no evidence that Defendants’
 14 DNCC agreements caused a reduction in the number of jobs. Ex. 2, 11/18/13 Leamer Depo. 895:7-
 15 896:1. *See also* Expert Report of Prof. Kevin M. Murphy, ¶ 15 (Nov. 25, 2013), attached to
 16 Cisneros Decl., Ex. 6 (“11/2013 Murphy Rpt.”) (“The bilateral agreements would not have
 17 changed the supply of or demand for labor overall or the number of open jobs that the defendants
 18 desired to and did fill.”); Snyder Rpt. ¶ 31 (“[T]he [DNCC] agreements did not reduce
 19 employment or hiring.”).

20 Given Plaintiffs’ own contention that this case is about suppression of information, not
 21 output, and the undisputed lack of evidence of any effect on output, the challenged conspiracy
 22 “might plausibly be thought to have ... possibly no effect at all on competition.” *Cal. Dental*, 526
 23 U.S. at 771. The law therefore prohibits use of either per se or quick look analysis. *Id.*; *Safeway*,
 24 651 F.3d at 1138; *MLB Props.*, 542 F.3d at 318.

25 **4. The Ninth Circuit’s en banc decision in *Safeway* requires application of** 26 **the full rule of reason here**

27 The Ninth Circuit’s en banc decision in *Safeway* requires rejection of the per se and “quick
 28 look” rules here. In *Safeway*, the court held that an agreement among four competing grocery store

1 chains to share their revenues during the term of a labor dispute was not subject to summary
 2 condemnation under per se or “quick look” analysis. 651 F.3d at 1222-23. The Ninth Circuit
 3 emphasized two significant features of the revenue-sharing agreement that distinguished it from
 4 the profit-pooling arrangement that was condemned as per se illegal in *Citizen Publishing Co. v.*
 5 *United States*, 394 U.S. 131 (1969). First, the “indefinite but temporary duration” of the agreement
 6 meant that “the grocers retained incentives to compete during the labor dispute period.” *Id.* at
 7 1135. Thus, “[u]nlike the *Citizen Publishing* arrangement, which insulated the newspapers entirely
 8 from competition,” the arrangement in *Safeway* left the grocers with “a continued interest in
 9 maintaining and growing their customer bases.” *Id.* Here, similarly, the very limited scope of the
 10 alleged conspiracy means that the Defendants retained substantial incentives to compete, even
 11 among themselves, for employees.

12 Second, the Ninth Circuit emphasized that the revenue-sharing agreement “did not include
 13 all of the grocers operating in the region.” *Id.* at 1136. While the combined sales of the four
 14 grocers that were party to the agreement accounted for between 54.4% and 76% of the relevant
 15 geographic markets, they “still faced competition from other retailers.” *Id.* The Ninth Circuit
 16 therefore found that “there is a significant probability that the grocers retained incentives to
 17 continue—or even to increase—discounting and advertising ..., to gain new customers if possible,
 18 and to maximize profitability and market share after the strike.” *Id.* Here, it is undisputed that
 19 Defendants account for a *tiny* percentage of the relevant labor market. *See, e.g.,* Snyder Rpt. ¶ 38;
 20 Murphy Rpt. ¶ 34 (Nov. 12, 2012), attached to Defs.’ Joint Renewed Mot. To Seal, at Dkt. 848
 21 (Apr. 10, 2014). *See also* Ex. 2, 11/18/2013 Leamer Depo. 1099:2-14; 1149:11-18. If grocers
 22 representing 2/3 of the market had incentives to continue to compete notwithstanding their
 23 revenue-sharing agreement, so too did these Defendants, who faced entirely unrestricted
 24 competition from 98% of the market.

25 The Ninth Circuit also emphasized that “[a] restraint of this nature has not undergone the
 26 kind of careful judicial scrutiny that would support the application of the per se rule.” *Id.* The
 27 court held that “[n]one of [the State’s] cases, alone or in combination, establishes sufficient
 28 judicial experience with a revenue sharing agreement of limited duration, among some

competitors in a market, so as to permit per se treatment of [that agreement].” *Id.* n.15. Here, the cases also do not establish any, let alone sufficient, judicial experience with this unusual and narrow alleged conspiracy. As the Ninth Circuit held in rejecting per se and “quick look” analysis in *Safeway*, “[t]he unique features of the arrangement ... and the uncertain effect these features had on the [defendants’] competitive behavior and incentives ... render any anticompetitive effects of the [alleged conspiracy] not obvious.” *Id.* at 1137. So too here.

Furthermore, two distinguished Ph.D. economists with extensive antitrust experience have concluded, based on fundamental economic principles, that the alleged conspiracy and the DNCC agreements at issue could not have had anticompetitive effects.⁸ *See* 11/2013 Murphy Rpt. ¶ 11(a) (“Economic theory and empirical evidence show that the challenged DNCC agreements *were not anticompetitive* and did not reduce the compensation of the broad group of employees in the Class certified by the Court.”); *id.* ¶¶ 13-38 (explaining conclusions); Snyder Rpt. ¶¶ 20, 24 (“the [six do-not-cold call agreements] *could not have had meaningful anticompetitive effects*,” and “the Google-Intel Agreement had a legitimate procompetitive justification”); *see also id.* ¶¶ 31-74 (explaining conclusions). Plaintiffs have proffered no expert testimony to the effect that a conspiracy of this type would always have an anticompetitive effect. The Court therefore cannot conclude the alleged conspiracy would have an “immediately obvious” anticompetitive effect or that “an observer with even a rudimentary understanding of economics could conclude that [it] would have an anticompetitive effect.” *Safeway*, 651 F.3d at 1133-34.

5. Courts apply the rule of reason to restraints that are, as here, ancillary to collaborative relationships

If Plaintiffs had challenged the individual two-party DNCC agreements, they would be subject to rule of reason analysis, not the per se rule. Courts consistently hold that a horizontal restraint on competition is ancillary to collaboration and therefore subject to the rule of reason “when it may contribute to the success of a cooperative venture that promises greater productivity

⁸ *See Safeway*, 651 F.3d at 1137 (“To reach a confident conclusion on the anticompetitive effects of the [revenue-sharing agreement] ... [o]ne might want to permit expert testimony”); *Meijer v. Barr Pharm., Inc.*, 572 F. Supp. 2d 38, 51 & n.15 (D.D.C. 2008) (expert testimony about economic effects is relevant to court’s decision whether to apply the per se rule).

1 and output.” *E.g., Princo Corp. v. Int’l Trade Comm’n*, 616 F.3d 1318, 1336 (Fed. Cir. 2010) (en
 2 banc); *Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 189 (7th Cir. 1985). Here,
 3 Plaintiff’s own expert, Dr. Marx, testified that “[a]n anti-solicitation [DNCC] agreement . . . by
 4 making a collaboration more successful than it otherwise would have been, can generate benefits
 5 for consumers even if that collaboration would have occurred in another form without the anti-
 6 solicitation agreement” Ex. 3, Marx Depo. 93:9-18; *see also id.* 76:18-23, 81:3-14, 83:5-15,
 7 86:20-87:2 (cold calling could undermine collaboration’s success); *id.* 90:25-92:23
 8 (collaboration’s increased success could benefit consumers and create more jobs). Intel’s expert,
 9 Dr. Snyder concluded that “the Google-Intel Agreement had a legitimate *pro-competitive*
 10 justification given their ongoing collaborations.” Snyder Rpt. ¶¶ 24, 57-64. Thus, it is undisputed
 11 that DNCC agreements can be reasonably ancillary to collaborative activity and procompetitive.
 12 They are therefore subject to the rule of reason. *See MLB Props.*, 542 F.3d at 340 (where
 13 “[plaintiff’s expert] conceded that the challenged provisions could have a procompetitive impact
 14 . . . , [they] must be . . . reviewed under the rule of reason”) (Sotomayor, J., concurring); *Polk*
 15 *Bros.*, 776 F.2d at 189 (“If [an agreement] *arguably* [promoted enterprise and productivity], then
 16 the court must apply the Rule of Reason to make a more discriminating assessment.”).

17 Contrary to Plaintiffs’ repeated assertions, *see, e.g.*, Mot. at 4, 5, 6, 10, for a restraint to be
 18 “ancillary,” it need *not* be essential to the collaboration; it need only “appear[] capable of
 19 enhancing the [collaboration’s] efficiency”—be “part of a larger endeavor whose success [it]
 20 promote[s].” *Princo*, 616 F.3d at 1336 (quoting *Rothery Storage & Van Co. v. Atlas Van Lines,*
 21 *Inc.*, 792 F.2d 210, 229 (D.C. Cir. 1986)); *Polk Bros.*, 776 F.2d at 188-89; *see also In re ATM Fee*
 22 *Antitrust Litig.*, 554 F. Supp. 2d 1003, 1015 (N.D. Cal. 2008) (rule of reason applies to restraint
 23 that is “reasonably ancillary to the legitimate cooperative aspects of the venture”); *Gerlinger v.*
 24 *Amazon.com, Inc.*, 311 F. Supp. 2d 838, 849 (N.D. Cal. 2004) (restraint ancillary if “it may
 25 promote the success of a more extensive cooperation”).

26 The very cases Plaintiffs cite, including *Princo*, *Polk Bros.*, and *Gerlinger*, squarely
 27 contradict their position. In *Freeman v. San Diego Ass’n of Realtors*, 322 F.3d 1133 (9th Cir.
 28 2003), the Ninth Circuit stated that “[t]o fall within [the ancillary restraints doctrine], the price

1 fixing *need not itself be essential*” *Id.* at 1151 (citing *NCAA*, 468 U.S. at 101). Instead,
 2 defendants need show only “that the efficiencies of the [venture] would be impaired [without the
 3 restraint].” *Id.* As Justice (then Judge) Sotomayor stated, “[u]nder the ancillary restraints doctrine,
 4 a challenged restraint *need not be essential*, but rather only ‘reasonably ancillary to the legitimate
 5 cooperative aspects of the venture.’” *MLB Props.*, 542 F.3d at 340 n.11. In *NCAA v. Bd. of*
 6 *Regents*, the Supreme Court, far from requiring that a restraint be “essential,” applied the rule of
 7 reason to the NCAA’s television plan even though “NCAA football could be marketed just as
 8 effectively without the [plan].” 468 U.S. at 96, 114. *See also Am. Needle v. Nat’l Football League*,
 9 130 S. Ct. 2201, 2216 (2010) (discussing *NCAA*).

10 Plaintiffs’ argument that the alleged overarching conspiracy should be judged under a
 11 different standard than the DNCC agreements, *see* Mot. at 6-7, is based on “formalistic line
 12 drawing,” not “demonstrable economic effect.” *See Leegin*, 551 U.S. at 887. Each agreement
 13 restrained the two parties to it from cold calling one another’s (but no one else’s) employees. The
 14 competitive effects of the six agreements, whether linked as part of an overarching conspiracy or
 15 not, would be the same: if the effect of each was potentially procompetitive or neutral, so too
 16 would be the effect of all six.⁹ Thus, regardless of whether the alleged conspiracy (as opposed to
 17 the individual DNCC agreements) could be considered ancillary to Defendants’ collaborative
 18 activities, there is no basis to conclude that it is “immediately obvious” the alleged conspiracy, any
 19 more than the individual DNCC agreements, “would always or almost always tend to restrict
 20 competition and decrease output.” *See Leegin*, 551 U.S. at 886.

21 **D. Plaintiffs Are Not Entitled to Either Effective Summary Adjudication Under**
 22 **the Rule of Reason or an Order Excluding Evidence of the Pro-Competitive**
Reasons for and Effects of the DNCC Agreements

23 Plaintiffs, in effect, belatedly seek summary adjudication under the rule of reason, arguing
 24 that the rule “requires that the defendant establish a relationship of necessity between the restraint

25 ⁹ The agreements theoretically might have different combined effects if the seven companies
 26 together had market power in a relevant economic market, while any two of them did not. That
 27 question, however, would necessarily be the subject of a full rule of reason analysis. *See*
 28 *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) (equating the rule of
 reason with “an inquiry into market power and market structure designed to assess [a restraint’s]
 actual effect”).

1 and a supposed pro-competitive benefit” and that Defendants have supposedly conceded they
 2 cannot do so. Mot. at 13. Plaintiffs are wrong on both the law and the facts. As Plaintiffs’ cases
 3 make clear, under the rule of reason, “[t]he *plaintiff* bears the initial burden of showing that the
 4 restraint produces *significant anticompetitive effects* within the relevant product and geographic
 5 markets”; “[if] the *plaintiff* meets this burden, the defendant must come forward with evidence of
 6 the restraint’s procompetitive effects”; and “[t]he *plaintiff* must then show that ‘any legitimate
 7 objectives can be achieved in a substantially less restrictive manner.’” *Hairston v. Pacific 10*
 8 *Conference*, 101 F.3d 1315, 1319 (9th Cir. 1996); *see also Brown Univ.*, 5 F.3d at 679; *Bhan v.*
 9 *NME Hosps., Inc.*, 929 F.2d 1404, 1413 (9th Cir. 1991). Moreover, Defendants have decidedly not
 10 conceded that they cannot show any procompetitive effects from the DNCC agreements.

11 Plaintiffs, having ostensibly filed no motions in limine, seek in this motion an order
 12 excluding “evidence or other testimony about purported procompetitive justifications for the
 13 conspiracy or the individual agreements” Mot. at 15. The request is meritless for several
 14 reasons. First, its premise—that the per se rule applies—should be rejected for the reasons stated
 15 above. Second, the evidence Plaintiffs seek to exclude—such as evidence that a Defendant entered
 16 into a DNCC agreement to further a collaborative relationship or for another independent
 17 purpose—is directly relevant to the jurors’ determination of whether each Defendant entered into
 18 the alleged overarching conspiracy. Third, if the Court is not prepared to rule now that the full rule
 19 of reason applies, it should hear the evidence concerning alleged anticompetitive and
 20 procompetitive effects before deciding to depart from that presumptive rule. *See Meijer*, 572 F.
 21 Supp. 2d at 51 & n.15. Lastly, evidence of procompetitive justifications would be directly relevant
 22 even under “quick look” analysis. *Safeway*, 651 F.3d at 1138.

23 **III. CONCLUSION**

24 Defendants respectfully submit that the full rule of reason is the appropriate standard for
 25 evaluating the legality of Defendants’ alleged conduct.

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19 **ATTESTATION:** Pursuant to Civil Local Rule 5-1(i)(3), the filer attests that concurrence in the
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